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In the Supreme Court of the United States

October Term, 1972

No. 72-1010

OHIO MUNICIPAL JUDGES ASSOCIATION, *et al.*,
Plaintiffs-Appellants,

vs.

ARTHUR L. DAVIS, *et al.*

and

RICHARD L. DITTO, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

MOTION TO DISMISS OR AFFIRM

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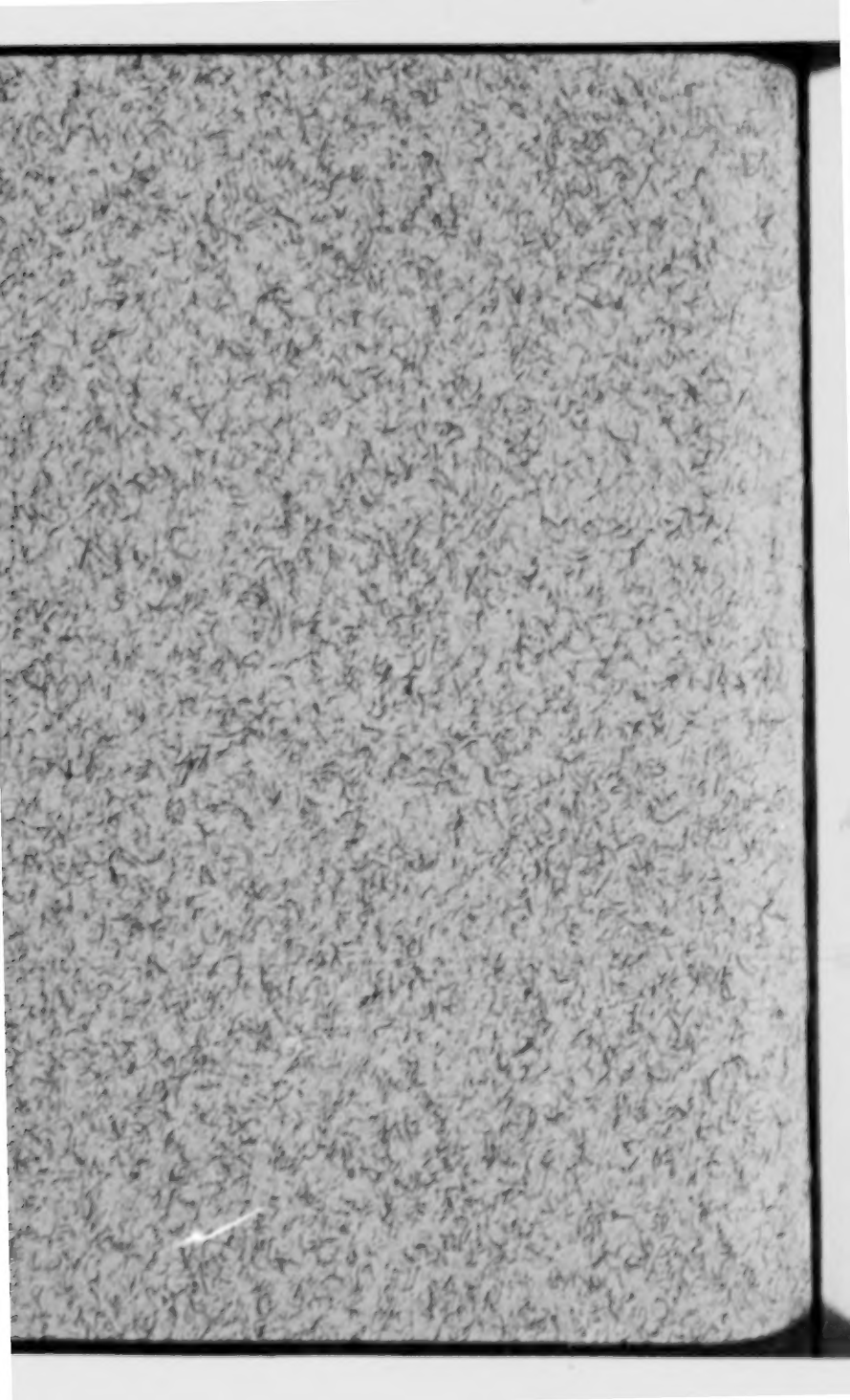

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The appellees move the Court to dismiss the appeal herein on the grounds that it does not present a substantial federal question and the judgment rests on an adequate non-federal basis, OR IN THE ALTERNATIVE, to affirm the judgment of a three-judge panel in the United States District Court for the Northern District of Ohio, Eastern Division on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Appellees believe the District Court below did not abuse its discretion in dismissing appellants' complaint for lack of jurisdiction over the subject matter of the suit because the complaint did not present a substantial federal question. The issue in the present case is not only uniquely narrow, but the law regarding "standing" and "requisite federal question" firmly established as well. No amount of speculative contention or strained semantics should warrant further argument on a matter not only already properly adjudicated upon the authority of nearly two hundred years precedence, but a matter which affects a very small class of Ohio judges who simply take issue with the Ohio Legislature because a contrary legislative intent might have benefited them in a monetary manner.

I.

OPINION BELOW

The judgment and opinion of the United States District Court aforementioned is unreported at this time; the full text of the opinion is therefore, found in the Appendix of Appellants' Jurisdictional Statement.

II.

THE STATE CONSTITUTIONAL PROVISION INVOLVED AND THE NATURE OF THE CASE

1. On May 7, 1968, the State of Ohio by referendum vote adopted Article IV, Section 6(B) of the Ohio Constitution. It provides as follows:

"The judges of the Supreme Court, Court of Appeals, and of the Courts of Common Pleas shall at stated

times receive for their services such compensation as may be provided by law, which shall not be diminished during their term of office . . . ."

2. The purpose of this amendment was to exempt judges of Ohio's constitutionally created courts (exclusively and solely those courts mentioned in the amendment) from the restrictions imposed by Article II, Section 20, of the Constitution of the State of Ohio, which reads as follows:

"The General Assembly in cases not provided for in this Constitution shall fix the term of office and the compensation of officers; but no change therein shall effect the salary of any officer during his existing term unless the office be abolished."

3. Thereafter, on June 10, 1968, the legislature of the State of Ohio enacted Section 141.04, Ohio Revised Code (incorporated herein as Appendix "A"), which provided a new schedule of compensation for judges of the Supreme Court, Courts of Appeals, and Courts of Common Pleas.

4. On the same June 10, 1968, the legislature also enacted Section 1901.11, Ohio Revised Code (incorporated herein as Appendix "B") which provided a separate and distinct compensation schedule for Municipal judges.

5. After the enactment of Section 1901.11, O.R.C., mentioned above, the legislative authorities of the various municipal corporations and the Boards of County Commissioners of the various counties were in a quandry regarding requests from Municipal Court judges for legislation implementing the salary increase. A decision by a general trial court in Franklin County, Ohio, held that the provisions of Article IV, Section 6(B) removed Mu-

nicipal Court judges from the prohibition of salary increases during their term.

6. As appellants well know, that general trial court's decision was legally binding only in that respective county. Furthermore, appellants obviously failed to mention in their Jurisdictional Statement (paragraph 5) that subsequent decisions by other general trial courts, as well as the opinion rendered by the Attorney General for the State of Ohio, were based solely upon the erroneous Franklin County decision, which they cited as authority for salary increases to several Municipal Court judges.

7. However, on March 1, 1972, the Supreme Court of Ohio in *Wallace v. Celina,* 29 Ohio St. 2d 109, 279 N.E.2d 866, held that the amendment of Article IV, Section 6(B) of the Ohio Constitution applied solely to Supreme Court judges, Courts of Appeal judges and Common Pleas Court judges.

8. The same court in the same decision also held that Article II, Section 20 of the Ohio Constitution is still applicable to Municipal Court judges and county judges. Thus, *Wallace v. Celina, supra,* established as the law of Ohio the following propositions:

a. Under the provisions of Article II, Section 20 of the Ohio Constitution, the salary of a Municipal Court judge may not be increased during his term of office.

b. The language of Section 6(B) of Article IV of the Ohio Constitution is explicit in that it does not include nor does it apply to Municipal Court judges.

c. Section 6(B) of Article IV of the Ohio Constitution has no effect upon Section 20 of Article II

of the Ohio Constitution in the application of Section 20 of Article II to Municipal Court judges.

9. The practical effect of the decision above was twofold: First, it prohibited any in term salary changes (increases or decreases) for Municipal Court judges, and for judges of any other *legislatively created courts,* because of the continued application of Article II, Section 20; Secondly, it permitted in term salary increases solely for judges of Ohio's *constitutionally created courts,* to wit: judges of the Supreme Court, Appellate Courts, and Courts of Common Pleas, because of Article IV, Section 6(B) which specifically mentioned them therein.

10. Thereafter, the plaintiffs-appellants, Ohio Municipal Judges Association, instituted this suit as a class action in the United States District Court for the Northern District of Ohio, Eastern Division, upon the allegation that Article IV, Section 6(B) is in conflict with the Fourteenth Amendment to the United States Constitution and constitutes a denial of equal protection of the law.

11. The District Court dismissed the complaint and denied appellants relief on the ground that plaintiffs did not present a substantial federal question, while stating that "the Ohio Supreme Court specifically addressed itself to the equal protection clause" of the Constitution of the United States, and that therefore they were "bound to apply the construction applied to Article IV, Section 6(B) by the Ohio Supreme Court," that such construction having been given by the Ohio Supreme Court as the controlling construction, and because "the language of the amendment is clear and unequivocal," they had "no authority to add to said Article."

III.

QUESTION PRESENTED IN THIS APPEAL

Whether or not the three-judge panel of the Federal District Court abused its discretion by dismissing the appellants' complaint prior to deciding the constitutional issue on its merits, on the basis that appellants' complaint did not present a substantial federal question.

IV.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

1. From the very beginning of this suit, appellants' sole motive for alleging a constitutional issue has been to seek the jurisdiction of a federal court for a purpose prohibited by law. This prohibition was enunciated by Justice Frankfurter who delivered the opinion of this Supreme Court in *Kesler v. Dept. of Public Safety of Utah*, 369 U.S. 153, 157, 82 S. Ct. 807 (1962). The opinion in pertinent part is as follows:

> "If an immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or the federal law, the three-judge requirement (Title 28, §2281) does not become operative."

The appellants herein attempted to raise a constitutional issue solely for the purpose of seeking a new construction of Article IV, §6(B) of the Ohio Constitution through "judicial legislation" in a Federal Court, to include Municipal judges, contrary to that Amendment's meaning as stated by the Ohio Supreme Court. Simply

stated, appellant sought not an abrogation of an unconstitutional state law, but a new construction of that state law by a three-judge panel in Federal District Court. In accordance with your decision in *Kesler v. Dept. of Public Safety of Utah, supra,* seeking the respective federal forum for such purpose is clearly prohibited.

2. There were several factors which promulgated appellants' prohibited act. First, appellants well knew that the State of Ohio's authority to terminate illegally paid in-term salary increases to Municipal judges was based solely upon Article II, §20 of the Ohio Constitution, which has prohibited the same for 171 years. Nevertheless, attempting to employ procedural chicanery, they alleged in the District Court that "injury" was due to the enforcement of Article IV, §6(B) rather than Article II, §20. Secondly, appellants also well knew that Article II, §20 does not transgress the United States Constitution, and that the Supreme Court of Ohio not only upheld Article IV, §6 (B), but also gave effect to the Ohio Legislature's clear and unambiguous intent to exclude Municipal judges of those *legislatively created courts* from the impact of Article IV, §6(B), which applies solely to judges of *constitutionally* created courts, to wit, those clearly and unambiguously stated therein.

3. With full knowledge of these circumstances, appellants desperately sought a federal forum, in hope that by tiptoeing through a semantical playground they might sow an issue which might reap a few dollars; that by frivolously alleging a denial of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States that, per chance, the District Court might not discover that their real purpose for seeking that forum was federal legislation and not constitutional abrogation.

4. Such was not the case, however, as the astute panel of judges in the District Court below clearly saw the frivolous nature of appellants' constitutional allegation. Their memorandum opinion stated in part as follows, unequivocally demonstrates the definiteness of that Court's conclusions:

> "Plaintiffs contend that the Ohio Supreme Court did not consider the equal protection issue raised in this action. *This Court has thoroughly read the Wallace decision and cannot agree with that contention. The Ohio Supreme Court specifically addressed itself to the equal protection clause . . . .*"

5. It is clear that the District Court did not abuse the discretion by dismissing appellants' complaint upon the basis that the constitutional allegation was so insubstantial as not to need further consideration. Indeed, the District Court was faithfully following the decision of this Supreme Court in the *Kesler* case, *supra*. For this reason, appellees respectfully request affirmation of the decision, or in the alternative, a dismissal of appellants' appeal.

6. Secondly, the case at hand presents no substantial question not previously decided by this Court because the District Court abstained from adjudicating the merits of a claim that Article IV, §6(B) denies appellants' equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, on the basis that the Ohio Supreme Court had already considered the issue and had given the controlling construction.

7. Appellants assert that the Federal District Court abused its discretion by refraining from considering in detail the merits of Ohio's classification scheme. As we have already seen, the District Court was firmly convinced

that the Ohio Supreme Court had considered such with respect to the equal protection clause of the Fourteenth Amendment.

8. There is absolutely no doubt that the Federal District Court was correct in refusing to consider the correctness of the Ohio Supreme Court's interpretation of Article IV, §6(B), even though appellants sought such re-examination under the guise that such interpretation was without adequate rationale. The District Court's justification for refraining from such re-examination is founded upon what this Supreme Court has repeatedly held, to wit, that the "authoritative construction of a state constitution rests with the courts of such state, whose decisions are binding on the federal courts." *American Federation of Labor v. Watson,* 327 U.S. 582, 66 S. Ct. 761, 90 L. Ed. 873 (1946); *Madden v. Commonwealth of Kentucky,* 309 U.S. 83, 60 S. Ct. 406, 84 L. Ed. 590 (1940).

9. Finally, appellants allege that Article IV, §6(B) of the Ohio Constitution creates an unreasonable and arbitrary classification so as to constitute a violation of the equal protection clause of the Fourteenth Amendment. Such claim is not only totally without merit, but again was raised solely in hope that the Federal District Court, and now this Supreme Court, might give a new and different construction of that amendment from the one given by the Supreme Court of the State of Ohio.

10. In dealing specifically with state classifications in fiscal situations, this Court recently summarized the controlling law in *Dandridge v. Williams,* 397 U.S. 491, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1970). At page 485 of your opinion, the Court stated:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely

> because the classification made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. The problems of government are practical ones and may justify if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 336 U.S. 420, 426."

11. Thus, one of the basic principles involved in considering the validity of legislation assailed under equality provisions of the federal and state constitutions is that in the exercise of its power to make classifications for the purpose of enacting laws over matters within its jurisdiction, the state enjoys a wide range of discretion.

In the State of Ohio, those judges specifically mentioned in Article IV, §6(B) are judges of courts *created by the Ohio* Constitution, while municipal judges which are not mentioned therein preside over courts created by the *Ohio Legislature*.

12. If in fact, the Ohio Legislature was to decide to abolish Municipal Courts as well as the office of its judge, for purposes of reorganizing local court structure throughout the State, it could do so. On the other hand, the Ohio Legislature could not abolish those constitutionally created courts specifically mentioned in Article IV, §6(B).

13. Furthermore, the Chief Justice and associate justices of the Ohio Supreme Court are one class and handled

not only by our State Constitution, but also by the legislature as one class (e.g., Ohio Constitution, Article IV, §2; Chapter 2503 O.R.C.). The judges of the Courts of Appeals are another class and they are considered such by both the Ohio Constitution and the legislature (e.g., Ohio Constitution, Article IV, §3; Chapter 2501 O.R.C.).

14. On the other hand, Municipal Court's and therefore their judges are a creature of solely the legislature (Chapter 1901 O.R.C.) and that legislature treats *all* municipal judges under the *same* formula of compensation, for they are considered a separate and distinct class.

15. In order for this Supreme Court to hold that the Equal Protection Clause of the Fourteenth Amendment has been violated, it would necessitate a finding that Article IV, §6(B) cannot under any set of facts be justified. Such a holding would not only ignore 171 years of Ohio history, but would declare that all of our courts and their judges are in the same class, that there exists no distinct levels of our judicial system.

V.

CONCLUSION

It is apparent from the facts at hand, that the issues and questions of law present in this case are extremely narrow, for they involve solely a specific construction given to a particular state constitutional amendment, whose import goes no further than Ohio's state lines, whose impact affects no more than a small class of disgruntled judges within.

Furthermore, it is not appellee's position that judges should not be adequately compensated, for indeed the

State of Ohio has recently raised their respective compensation schedule.

But it is appellees' position that the greatest single factor contributing to our continued freedom and justice in this cherished United States of America is that we are a nation governed by law, rather than by men; that just as we do not give order and form to our society merely upon the decrees of a king, or the whims of an aristocracy, neither do we allow judges, or others in positions of authority, to abridge the Supreme Law of the land. That just as the common citizenry of Ohio are also governed by the state constitution, we unhesitatingly demand that our state judges be governed by the same, as well.

Therefore, in consideration of the foregoing, we respectfully request that the District Court's decisions be affirmed, or in the affirmative, to dismiss the appeal on the grounds that it does not present a substantial federal question.

Respectfully submitted,

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APPENDIX A

Section 141.04, Ohio Revised Code

COMPENSATION OF JUDGES

141.04 *Compensation of Judges.*

The annual salaries of the chief justice of the supreme court and of the judges named in this section payable from the state treasury are as follows:

(A) Chief justice of the supreme court, thirty-two thousand dollars;

(B) Judges of the supreme court, thirty thousand dollars;

(C) Judges of the Court of appeals, twenty-eight thousand dollars;

(D) Judges of the court of common pleas, eleven thousand dollars;

(E) Judges of the probate court, eleven thousand dollars.

Neither the chief justice of the supreme court nor any judge of the supreme court or of the court of appeals shall hold any other office of trust or profit under the authority of this state or the United States. (132 v. S 517. Eff. 6-10-68. 130 v. Pt 2, H 14; 128 v 772; 126 v 194; 125 v 107)

APPENDIX B

Section 1901.11, Ohio Revised Code

1901.11 *Compensation of judges.*

Judges designated as part-time judges by section 1901.08 of the Revised Code shall receive as compensation not less than six thousand dollars per annum, as the legislative authority prescribes, and such judges shall be disqualified from the practice of law only as to matters pending or originating in the courts in which they serve during their terms of office.

Judges designated as full-time judges by section 1901.08 of the Revised Code and all judges of territories having a population of more than fifty thousand regardless of designation are subject to section 4705.01 of the Revised Code and shall receive as compensation ten thousand dollars per annum, plus an amount equal to twelve cents per capita for the first forty thousand of the population of the territory in which he resides when elected or appointed, as ascertained by the latest federal census of the United States, ten cents per capita for the population of said territory of more than forty-thousand. The compensation of any municipal judge shall not be more than an amount which is two thousand dollars per annum less than the statutory compensation of a judge of the court of common pleas in the county in which the municipal court is situated, or twenty-three thousand dollars whichever is the smaller amount. The presiding judge of a municipal court shall receive an additional five hundred dollars and the chief justice of a municipal court shall receive an additional one thousand dollars, over and above the salaries paid to any other judge of the same court.

The compensation of municipal judges shall be paid in semi-monthly installments, three-fifths of such amount being payable from the city treasury and two-fifths of such amount being payable from the treasury of the county in which such city is situated. If the territory is located in two or more counties, a total of two-fifths of such amount shall be payable by all of the counties in proportionate shares from the treasury of each of such counties in accordance with the respective populations of that portion of each of the several counties within the jurisdiction of the court. Population is determined by the latest decennial federal census. Notwithstanding any other provision of this section, until the first day of January, 1973, the compensation of all the judges of each municipal court shall not be less than that to which the judges of each court are entitled on the effective date of this act, including any additional compensation prescribed by the legislative authority of such municipality. (132 v. S 517. Eff. 6-10-68. 130 v Pt 2, H 14; 130 v H 266; 129 v 582; 128 v. 601; 127 v 913; 126 v 99; 125 v 168)